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No. 7

In the Supreme Court of the United States

OCTOBER TERM, 1958

LOUIS JOSEPH ABBATE AND MICHAEL LOUIS FALCONE,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the Court of Appeals (R. 38–43) is reported at 247 F. 2d 410.

JURISDICTION

The judgment of the Court of Appeals was entered on August 8, 1957 (R. 44) and a petition for rehearing was denied on September 9, 1957 (R. 44). The petition for a writ of certiorari was filed on October 8, 1957, and was granted as limited, on December 16, 1957 (R. 45; 355 U. S. 902). The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

QUESTION PRESENTED[1]

Whether the petitioners were twice placed in jeopardy, contrary to the Fifth Amendment, by their conviction in the Southern District of Mississippi for conspiracy to destroy communication facilities "operated or controlled by the United States", in violation of 18 U. S. C. 1362, after they had been convicted in the courts of the State of Illinois on their plea of guilty to an indictment for conspiring in that state to injure property of two private communications corporations.

STATUTES INVOLVED

18 U. S. C. 371 provides in pertinent part:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

* * * * *

---

[1] The grant of certiorari was limited to question 2 of the petition for the writ, which reads as follows (355 U. S. 902):

"Whether the petitioners were twice placed in jeopardy in violation of the Fifth Amendment to the Constitution of the United States, where the evidence shows that they had been previously convicted in the Courts of the State of Illinois of the crime of conspiracy to destroy the property of the Southern Bell Telephone Company, upon the same facts as were presented in the Courts of the United States, and upon which they were convicted of conspiracy to destroy a communications line operated or controlled by the United States."

18 U. S. C. 1362 provides:

> Whoever willfully or maliciously injures or destroys any of the works, property, or material of any radio, telegraph, telephone, or cable, line, station, or system, or other means of communication, operated or controlled by the United States, whether constructed or in process of construction, or willfully or maliciously interferes in any way with the working or use of any such line, or system, or willfully or maliciously obstructs, hinders, or delays the transmission of any communication over any such line, or system, shall be fined not more than $1,000 or imprisoned not more than three years, or both.

Title 38, Section 139, Smith-Hurd Ill. Stat. Ann. (1957 Supp.) provides in pertinent part:

> CONSPIRACY TO DO AN ILLEGAL ACT—BOYCOTT—BLACK LIST—PENALTY—MARKETING ASSOCIATIONS OF FARMERS, DAIRYMEN AND FRUIT GROWERS NOT INCLUDED—COMMON LAW CONSPIRACY.—If any two or more persons conspire or agree together, or the officers or executive committee of any society or organization or corporation, shall issue or utter any circular or edict, as the action of or instruction to its members, or any other persons, societies, organizations, or corporations, for the purpose of establishing a so-called boycott or black list, or shall post or distribute any written or printed notice in any place, with the fraudulent or malicious intent wrongfully and wickedly to injure the person, character, business, or employment, or property of another, or to obtain money or other property by false

pretenses, or to do any illegal act injurious to the public trade, health, morals, police, or administration of public justice or to prevent competition in the letting of any contract by the State, or the authorities of any counties, city, town or village, or to induce any person not to enter into such competition, or to commit any felony, they shall be deemed guilty of a conspiracy; and every such offender, whether as individuals or as the officers of any society or organization, and every person convicted of conspiracy at common law, shall be fined not exceeding $2000 or shall be imprisoned in the county jail not exceeding one year, or shall be imprisoned in the penitentiary for a term of not less than one year and not exceeding five years, or may be so fined and so imprisoned in the county jail or penitentiary.

* * * * *

STATEMENT

1. An indictment returned in the United States District Court for the Southern District of Mississippi on January 23, 1956 (R. 2) charged petitioners Abbate and Falcone, and two others, James Shelby and Charles Perry, with conspiring, together with one Norman McLeod (not indicted), from about April 1, 1955 to about May 12, 1955, in the Jackson Division of the Southern District of Mississippi, to violate 18 U. S. C. 1362, *supra,* by agreeing willfully and maliciously to injure and destroy, and hinder message transmission over certain works, property and material known as coaxial repeater stations and micro-wave towers located in the States of Missis-

sippi, Tennessee, and Louisiana which were "essential and integral parts of systems and means of communication operated and controlled by the United States" (R. 2–5). The indictment also charged that petitioners conspired to "wilfully and maliciously interfere in the use and working of communication systems operated and controlled by the United States by damaging same." (R. 3.) The following overt acts were alleged as in furtherance of the conspiracy charged (R. 4–5):

> 1. On or about April 19, 1955, at Chicago, Illinois the defendant James Shelby met and conferred with Louis Joseph Abbate, Michael Louis Falcone and Norman D. McLeod, alias John Morton.
>
> 2. On or about April 19, 1955, at Chicago, Illinois, the defendant James Shelby delivered to Louis Joseph Abbate, Michael Louis Falcone, and Norman D. McLeod, alias John Morton, three large manila envelopes containing maps and plans showing the locations and certain coaxial repeater stations and micro-wave towers in the States of Tennessee, Louisiana and Mississippi.
>
> 3. On or about April 21, 1955 Norman D. McLeod, alias John Morton, traveled from Chicago, Illinois to Jackson, Mississippi, and carried with him suitcases containing dynamite, fuses, caps, and other materials suitable and designed for use as explosives.
>
> 4. On or about April 22, 1955 James Shelby checked into the Edwards Hotel, Jackson, Mississippi.
>
> 5. On or about April 22, 1955, at Jackson,

Mississippi, the defendants, James Shelby and Charles G. Perry, met and conferred with Norman D. McLeod, alias John Morton.

6. On or about April 22, 1955 Charles G. Perry drove Norman D. McLeod, alias John Morton, from Jackson, Mississippi into Rankin County, Mississippi for the purpose of locating and inspecting installations to be dynamited.

7. On or about April 22, 1955 James Shelby met Norman D. McLeod, alias John Mornton, (sic) and drove McLeod North on U. S. Highway 51 into Madison County, Mississippi to point out installations to be dynamited.

8. On or about April 23, 1955 Charles G. Perry drove Norman D. McLeod, alias John Morton, in and around Jackson, Mississippi.

9. On or about April 25, 1955, at Chicago, Illinois, Louis Joseph Abbate and Michael Louis Falcone caused to be typed copies of maps and plans showing locations of installations in Mississippi, Tennessee and Louisiana.

10. On or about April 28, 1955, on U. S. Highway 49, about 23 miles South of Jackson, Mississippi, in Simpson County, Mississippi, an explosion damaged a repeater station containing a coaxial cable which was an essential and intergral (sic) part of a system and means of communication operated and controlled by the United States.

After trial by jury, on June 22, 1956, all of the defendants were convicted (R. 33–34).[2] On appeal, the Court of Appeals affirmed as to petitioners, but re-

[2] Petitioner Falcone was sentenced to imprisonment for one year (R. 36–37); petitioner Abbate was sentenced to imprisonment for three years and to pay a fine in the amount of $1,000 (R. 34–35).

versed as to Shelby and Perry on the ground that evidence of statements made by petitioners to Illinois authorities after arrest had been improperly admitted as against the other conspirators (R. 38–43). As to petitioners, the Court of Appeals found (1) that the evidence was sufficient to establish the fact of the conspiracy and the overt acts in furtherance thereof alleged in the indictment; (2) that (R. 43) "[t]here was ample evidence from which the jury could have found that, though the facilities were owned by the telephone company [Southern Bell Telephone and Telegraph Company], many of the circuits were under full time operation and control by the Government, and that the telephone company could not even make repairs on such circuits without first obtaining the Government's permission"[3]; and

[3] The government showed through testimony of an expert witness, an engineer of the Southern Bell Telephone Company, that no less than twenty-one of its circuits running through two sets of coaxial cables in the area designated by plans found in petitioner Abbate's possession were used solely by agencies of the United States, including the Civil Aeronautics Administration and such military units as the Strategic Air Command and the Navy (Tr. 357–402). Many were used twenty-four hours a day (Tr. 371, 372, 380–382); bore distinctive government markers; and could not be repaired or otherwise touched by the company without permission of the government (Tr. 373, 377). In some instances, where the military owned the distribution cables, the government did its own repairs (Tr. 378). Some of the circuits, designated as "TT" or teletype-writer circuits, were described as engineered military circuits which were held in readiness for a national emergency and which carried messages transmitted by electric machines operated exclusively by the government (Tr. 381, 382); with respect to those connecting with overseas circuits in Washington, the telephone company had no control whatever (Tr. 383).

(3) that the evidence was sufficient to prove that the destruction of such federally operated and controlled property, the object of the conspiracy charged in the indictment, and prohibited by 18 U. S. C. 1362, was within the contemplation of the conspirators (R. 38–43).

2. For the first time in this Court, petitioners raised the contention that the present prosecution placed them twice in jeopardy for "the same offense" of which they had previously been convicted on their plea of guilty in the Criminal Court of Cook County, Illinois, and for which they had been sentenced to imprisonment for terms not to exceed three months (Pet. Br. 6; R. 39, fn. 4). The evidence as to petitioners' prior state convictions was offered by the co-defendants, Shelby and Perry, in connection with their motions for a separate trial (R. 5–7). This matter was also adverted to in the application for probation on behalf of petitioners as an ameliorating factor to be considered in imposing sentence (R. 33).[4] All that appears as to the state proceedings is (1) the testimony at the federal trial to the effect that petitioners were arrested by the local Illinois authorities on or about April 26, 1955 (Transcript 253, 258; R. 16–17); (2) the eight-count state indictment which had been returned on May 25, 1955 (R. 8–13); and (3) the fact that on August 15, 1955, petitioners received sentences of three months on their pleas of guilty to the state indictment (R. 32). The state indictment (based on

[4] At that time, government counsel pointed out that the state proceeding was (R. 33) "not the identical offense, but an offense against the State of Illinois."

Title 38, Section 139, Smith-Hurd Ill. Stat. Ann. (1957 Supp.) *supra*, pp. 3–4) charged both petitioners in each count with conspiring in Cook County, Illinois, on or about April 19, 1955, with co-conspirators Shelby and McLeod and others [5] "with the fraudulent and malicious intent unlawfully, designedly, wrongfully and wickedly to injure the property of another, to wit: to injure communication facilities belonging to the Southern Bell Telephone and Telegraph Company, a corporation, without the consent of said Southern Bell Telephone and Telegraph Company, and to injure communications facilities belonging to the American Telephone and Telegraph Company, a corporation, without the consent of said American Telephone and Telegraph Company, by use of explosive * * *" (R. 8, 13). This indictment set forth no overt acts in furtherance of the conspiracy, and, since petitioners entered a plea of guilty in the state proceeding, no evidence was taken.

SUMMARY OF ARGUMENT

Petitioners were convicted in a federal court in Mississippi of having conspired to injure or destroy, in that state, telephone circuits "operated or controlled" by the United States, and to interfere with the use and working of a communications system operated and controlled by the United States. They had previously, in Illinois, pleaded guilty to a state indictment charging them with having conspired, in Illinois, to injure property of two private telephone companies. Assuming that the two indictments are

[5] Co-defendant Perry was not named in the state indictment as a co-conspirator.

based on the same acts (petitioners having participated in the federal conspiracy only in Illinois), it does not follow that the two offenses are the same. The federal statute protects against sabotage of federally-operated or controlled communications systems. It thus reflects a specific and peculiar federal interest. The state statute protects private property, in general, against malicious destruction, this being the limit of the state interest involved here. The "gist" or "purpose" of the statutes making the conduct criminal is different; the state and federal statutes seek to protect "separable social interests." The successive prosecutions therefore did not violate the double jeopardy clause of the Constitution.

I

A. Not all successive prosecutions by state and federal governments raise the same problems of jurisdiction and jeopardy. At the extremes of the spectrum are, on the one hand, crimes punishable only by the state and, on the other, those in which the federal government has preempted the entire field. Between these extremes there are at least four different categories of crimes which can involve prosecutions by each sovereign for the same acts.

1. There are crimes where the exercise of federal and state jurisdiction is concurrent in the sense that both sovereigns punish the same crime, *i. e.*, the elements of both offenses are identical. Such was the situation in *United States* v. *Lanza*, 260 U. S. 377.

2. There is another category where the state and federal governments are protecting essentially the same

interests, but where there is an additional element of the federal offense which is derived solely from the fact that a separate sovereign is involved. The petitioner in *Bartkus* v. *Illinois,* 355 U. S. 281, presently before this Court on reargument, No. 1, argues that the federal and state bank robbery statutes there involved fall in this category.

3. Still further removed from concurrent jurisdiction are the large number of federal crimes which are proscribed to supplement and assist state law enforcement by use of the exclusive federal power over interstate facilities. Although the social interest protected is the same, the particular act prohibited by the federal government is beyond the reach of the state and must be performed before a federal crime has been committed.

4. A fourth group contains those cases where the federal and state statutes may cover the same physical acts, but where the federal and state statutes protect "separable social interests" and have different "gists" or "purposes." Thus, the interest of a state in preventing cheating is different from the interest of the federal government in prohibiting counterfeiting. *Fox* v. *Ohio,* 5 How. 410. The interest of the federal government in protecting a marshal executing its process is different from that of the state in preventing assault. *United States* v. *Cruikshank,* 92 U. S. 542, 550–551. The interest of the federal government in protecting federal elections is different from the interest of the state in protecting state elections, even if the criminal acts are done at the same time. *Ex parte Siebold,* 100 U. S. 371, 393. The same act may violate

state law against assault and also constitute a deprivation of federal civil rights. *Screws* v. *United States,* 325 U. S. 91.

B. This case falls within the fourth category mentioned above, for the special interest of the federal government in keeping open *its* communications by prohibiting sabotage of lines which *it* operates or controls is of a different nature and quality from the general interest of the state in protecting private property.

The federal statute is derived from legislation which originated in the House Committee on Military Affairs, together with other legislation dealing with problems arising out of the Civil War. It was designed as an antisabotage law to protect communication facilities used by the federal government which had not been adequately protected during the war crisis. Thus, the interest sought to be protected by the federal statute is a peculiarly federal interest; the interest sought to be protected by the Illinois statute prohibiting destruction of private property is peculiarly a local interest. Under the federal statute it is necessary to prove knowledge by the conspirators of federal operation and control. Proof that the conspiracy was directed only to injury of private property, which would suffice under the state statute, would not have established the federal offense. Under established principles, since each statute and each indictment required proof of an essential element not a part of the other, the two offenses are separate. *Gore* v. *United States,* No. 668, Oct. Term, 1957, decided June 30, 1958; *Blockburger* v. *United States,* 284 U. S. 299;

Gavieres v. *United States*, 220 U. S. 338. Hence, separate punishment by the state and federal government for the two separate offenses does not violate the double jeopardy clause.

The particular facts of this case emphasize the undesirable results that can flow from permitting a state prosecution to preclude federal enforcement in this category of cases. The state returned an indictment, to which petitioners pleaded guilty, charging conspiracy to injure private property which was physically situated, not in Illinois, but in Mississippi. However adequate Illinois may have regarded the three-month sentence imposed upon petitioners for the conspiracy to injure private property located in Mississippi, it is not the measure of the right of the federal government to punish a conspiracy to interfere with the use and working of a federally-controlled communications system, or of the interest of the federal government in preserving that system inviolate. The federal government must be able to act independently to enforce its federal law protecting federally-controlled property. If the rule were otherwise, so that a state conviction would preclude federal prosecution even though the state was less concerned with the particular violation of its laws, or had interests different from those of the United States, the fear expressed in *Lanza* of the "race of offenders" to state courts might well be realized.

II

A. Petitioner, as does the petitioner in *Bartkus*, No. 1, seeks to have this Court reconsider its holding in *Lanza*. But since the offenses prosecuted by

the state and federal governments were different in this case—as we have shown in Point I—no occasion for such a reexamination is presented here. Moreover, a ruling in favor of the petitioner in *Bartkus* would not be controlling in this case for the additional reason that *Bartkus* involves a state trial *after* a federal *acquittal* whereas, in this case, a federal trial followed a state conviction. In *Bartkus,* petitioner urges that federal supremacy bars a state trial after a federal acquittal. Here, on the other hand, the interests of federal supremacy operate to validate the subsequent federal action.

To reach the basic issues of the relationship of double jeopardy to our system of federalism one must hypothesize (1) a valid federal law protecting the identical interests as those sought to be protected by the state, and (2) that, despite this identity of interests, federal preemption has not occurred. Because the federal law here in question is an anti-sabotage statute dealing with aspects of national security, this latter assumption may well be an unrealistic one under *Pennsylvania* v. *Nelson,* 350 U. S. 497, even if the first criterion is met.

B. But, assuming both hypotheses to be present, we submit that, as *Lanza* held, the federal government is free—unless Congress otherwise provides, as it has on occasion done—to pursue federal policy in the federal courts despite a prior state conviction. Each government is acting within its own sphere in determining what shall be an offense against its peace and dignity. Even where the social interest protected is the same, the offenses as defined by the dif-

ferent legislatures may be and frequently are different. And to the extent that the interests are separately defined and separately punished, it cannot be said that the policies of one sovereign are effectively enforced by the other. Under our established principles of federalism, each sovereign is free to enforce its own law without regard to action by the other. And where the federal government is concerned, the doctrine of federal supremacy reenforces that right of freedom from state control or state supersession.

As was pointed out in *Lanza,* if the federal government were precluded by a prior state criminal proceeding, there would be grave possibilities of the hobbling of federal law enforcement, especially in certain areas where particular federal laws may be locally unpopular (as was Prohibition). This diminution in the effectiveness of federal law enforcement would be difficult to avert. The rule that a mock trial does not constitute jeopardy would not offer any real protection against the invocation of the state courts to thwart federal policy. Unfortunately, in areas where real conflicts between federal and state policy may develop, the prior state proceedings may in form be initiated by the state itself and the problems of proving collusiveness would, in the vast majority of instances, be insurmountable.

ARGUMENT

The problem in this case is whether petitioners' conviction in the Southern District of Mississippi for conspiracy between April 1, 1955, and May 12, 1955, to injure or destroy telephone circuits "operated or

controlled" by the federal government, and to interfere in their use and operation, in violation of 18 U. S. C. 1362, *supra*, p. 3, is precluded by their previous conviction in the Criminal Court of Cook County, Illinois. The state proceedings arose under an indictment which charged petitioners with conspiring, on or about April 19, 1955, in the jurisdiction of that court, to injure the property of the Southern Bell Telephone and Telegraph Company and the facilities of the American Telephone and Telegraph Company, against the peace and dignity of the People of the State of Illinois (R. 8–13). On the assumption that both crimes depend for their proof "upon the same facts" (Pet. 2), petitioners contend that they have been twice put in jeopardy.

The premise that the two indictments are based on the same facts is not established by the record; it is at most only inferentially suggested. The Illinois indictment, which alleges no overt acts, charged a conspiracy in Illinois on April 19, 1955, to injure the property of two private companies. The federal Mississippi indictment lays the venue of the conspiracy in Mississippi, and while it alleges overt acts by these petitioners in Illinois on April 19, 1955, it also alleges a further overt act by them in Illinois on April 25, 1955. (Paragraph 9, p. 6, *supra*.) Since, however, the evidence at the federal trial showed that petitioners' participation in the conspiracy was limited to activities in Illinois, we may accept the premise that the *acts* of petitioners which gave rise to both indictments were the same. It does not follow, however, that the *offenses* were the same.

The interests protected by the two statutes—private property protected by the state, and the federally operated and controlled communications system protected by the federal statute—are legally and factually different. The resultant injury in each case is legally and factually different. Hence, the two offenses are different, not merely because different sovereigns created the offenses, but because their essential elements and purposes are different. For that reason, we do not believe that this case presents the question of whether, under the double jeopardy clause of the Federal constitution, the federal government may prosecute a defendant after a trial for the same type of offense under state law protecting the same social interest. See *United States* v. *Lanza,* 260 U. S. 377, upholding such successive prosecutions. In view of the substantial separate federal interest protected by the federal statute, no state prosecution could preclude the federal government from enforcing its laws designed to protect property which it operates and controls as a part of a federal communications system. See Point I, *infra.*

Moreover, although we believe that this case does not truly present the basic issue of double jeopardy decided in *Lanza,* we also submit, following *Lanza,* that the national government should be free to pursue its policies in the federal courts even if it be assumed *arguendo* that the federal and state interests in this case are identical. See Point II, *infra.*

I

SINCE THE FEDERAL STATUTE PROTECTS AN IMPORTANT FEDERAL INTEREST WHICH IS ENTIRELY DIFFERENT FROM THE INTEREST OF THE STATE, THE TWO OFFENSES ARE DIFFERENT IN LAW AND IN FACT. HENCE, FEDERAL PROSECUTION AFTER A STATE CONVICTION DOES NOT VIOLATE DOUBLE JEOPARDY.

A. *Where the interests protected by state and federal statutes are different, the offenses created by those statutes are distinct.*

Petitioners' entire argument is based on the premise that, where state and federal prosecutions are based on the same *acts*, the prosecutions are necessarily for the same *offense*. This easy assumption disregards the complexities of our federal structure. Merely because both the state and the federal government may have exercised legislative power—so that, in a particular factual context, a single act may offend both sovereigns—does not mean that the interests which each sovereign sought to protect are the same. For this reason, before turning to the facts of this case, we think it is important to note at the outset that not all successive prosecutions by state and federal government for the same acts fall within the same pattern. Between the two extremes of crimes punishable only by the state and those in which the federal government has preempted the whole field (see *Pennsylvania* v. *Nelson*, 350 U. S. 497), there are at least four different categories of crimes which can involve prosecutions by each sovereign for the same acts:

1. There are crimes where the exercise of federal and state jurisdiction is truly concurrent. Such is

the crime of carrying passengers in interstate commerce without a license from the Interstate Commerce Commission, before this Court in *California* v. *Zook,* 336 U. S. 725, where it was held that the state had the power to make such an act an offense under state law. Analogous to that situation were the prohibition offenses which came before this Court in *United States* v. *Lanza,* 260 U. S. 377 and *Hebert* v. *Louisiana,* 272 U. S. 312. The Eighteenth Amendment specifically conferred concurrent jurisdiction on the federal government and the states. While this Court, in those cases, held that the exercise of state power to punish crime did not stem from that Amendment alone, the fact that the crimes arose under the Eighteenth Amendment did make it immaterial that the federal legislation defined the offense in the precise manner in which the crimes were defined by the state. In *Lanza,* a federal prosecution for manufacturing, transporting and possessing liquor followed a state conviction for these offenses. In the *Hebert* case, a state prosecution for manufacturing liquor was initiated and completed while the defendant was under indictment for the same offense in the federal courts. In holding that successive prosecutions were permissible, this Court assumed that the offenses were the same.

2. There is another category where the state and federal governments are protecting essentially the same interests, but where there is an additional element of the federal offense which is derived solely from the fact that a separate sovereign is involved. See *Jerome* v. *United States,* 318 U. S. 101, 105. The

petitioner in *Bartkus* v. *Illinois*, 355 U. S. 281, presently before this Court on reargument, No. 1, argues that the federal bank robbery statute proscribes such an offense, in that it is designed to protect the bank rather than a specific federal interest, and only the jurisdictional difference distinguishes the two offenses.

3. Still further removed from concurrent jurisdiction are the large number of federal crimes which are designed to supplement and assist state law enforcement by using the exclusive federal power over interstate commerce to prevent perpetration of crime or the transmission of contraband. The Mail Fraud statute (18 U. S. C. 1341), the Mann Act (18 U. S. C. 2421), the Federal Kidnapping Act (18 U. S. C. 1201), and the Stolen Motor Vehicle Act (18 U. S. C. 2312), are all examples of crimes which have the same social purpose as various state crimes, but where the particular acts prohibited by the federal government are beyond the reach of state power. A further act must be committed by the defendant, *e. g.*, crossing a state border, before federal jurisdiction may be asserted.

4. Another group—and the one into which, as we show below, we think this case falls—contains those cases where the federal and state statutes may cover the same physical acts, but where the interests protected by the respective enactments are essentially different. In other words each government within its own sphere of authority is acting to protect a separate social interest by enacting statutes having different "gists" or "purposes."

That different interests of the state and federal government may be violated by the same act has long been recognized. In 1847, in *Fox* v. *Ohio,* 5 How. 410, this Court, in holding that a state may punish one who utters a false coin as a cheat, observed that the Ohio crime was distinct from the crime of counterfeiting punishable only by the federal government. The former, it observed "is a private wrong, by which the government may be remotely, if it will in any degree, be reached"; the latter, "an offence directly against the government, by which individuals may be affected" (5 How. at p. 433). And in *United States* v. *Marigold,* 9 How. 559, 569, in holding, conversely, that Congress could punish the passing of counterfeit, the Court noted that "the same act might, as to its character and tendencies, *and the consequences it involved,* constitute an offence against both the State and Federal governments, and might draw to its commission the penalties denounced by either, as appropriate to its character in reference to each" (emphasis added). See also, *Ex parte Siebold,* 100 U. S. 371, 390; *Cross* v. *North Carolina,* 132 U. S. 131; *Pettibone* v. *United States,* 148 U. S. 197, 209; *Crossley* v. *California,* 168 U. S. 640; *Sexton* v. *California,* 189 U. S. 319; *Gilbert* v. *Minnesota,* 254 U. S. 325; *McKelvey* v. *United States,* 260 U. S. 353, 358–359; *Westfall* v. *United States,* 274 U. S. 256, 258.

There are numerous other illustrations of this category of cases where the federal and state interests in the prosecution of offenses arising from a single transaction are in their essential character different.

The classic statement is that in *United States* v. *Cruikshank*, 92 U. S. 542, 550–551:

> Thus, if a marshal of the United States is unlawfully resisted while executing the process of the courts within a State, and the resistance is accompanied by an assault on the officer, the sovereignty of the United States is violated by the resistance, and that of the State by the breach of peace, in the assault. * * *.

When the federal government prosecutes a fraud in an election in which federal officials are chosen, it is enforcing a federal interest even if the same acts violate a state interest in the integrity of state elections. *Ex parte Siebold*, 100 U. S. 371, 393.

In *Crossley* v. *California*, 168 U. S. 640, this Court held that, while the derailment of a train carrying the mails of the United States is a crime which may be punished by the federal government, the death of the engineer which resulted from the derailment is a crime against the laws of the state which could be punished by the state through an indictment for murder.

More recently, this Court has recognized that the same act of assault of a private individual by a state officer acting under color of law may simultaneously constitute a deprivation of the victim's federal rights and a common law crime punishable by the state. In *Screws* v. *United States*, 325 U. S. 91 (opinion of Mr. Justice Douglas) it was observed (*ibid.*, p. 108):

> The fact that it [the act upon which the federal offense is based] is also a violation of state law does not make it any the less a federal offense punishable as such. Nor does its punish-

ment by federal authority encroach on state authority or relieve the state from its responsibility for punishing state offenses.

We think it is clear that, whatever may be said of the other three categories discussed above (*supra*, pp. 18–20), successive prosecutions under the fourth category cannot be said to be for the same offense, and therefore in violation of the prohibition against double jeopardy. Under the classic test of identity of offenses—that each involves an element not present in the other[6]—the offenses would be different since the federal interest involved in federal prosecution would not be the same as the state interest in the state prosecution. This Court has never held that all offenses committed in the course of a "single transaction" are one, regardless of the statutes violated and the injuries resulting therefrom. See *Gore* v. *United States*, No. 668, Oct. Term, 1957, decided June 30, 1958. See also, in addition to the cases cited in fn. 6, *supra*, *Bell* v. *United States*, 349 U. S. 81, 82–83 ("Congress could no doubt make the simultaneous transportation of more than one woman in violation of the Mann Act liable to cumulative punishment for each woman so transported. The question is: did it do so?"); *United States* v. *Universal C. I. T. Credit Corporation*, 344 U. S. 218. Even those who are critical of present modes of determining identity of offenses agree that offenses are separate where there are separable social interests sought to be protected. See,

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[6] *Pinkerton* v. *United States*, 328 U. S. 640, 644; *Blockburger* v. *United States*, 284 U. S. 299; *Gavieres* v. *United States*, 220 U. S. 338. See also *Hoag* v. *New Jersey*, 356 U. S. 464.

e. g., Gore v. *United States, supra* dissenting opinion of the Chief Justice; Kirchheimer, *The Act, The Offense and Double Jeopardy,* 58 Yale L. J. 513, 524 (1949).

As we show below, this case falls within the fourth category discussed above, because prosecution by the federal government was not for the same offense for which sentence was imposed by the state. There is thus no violation of the double jeopardy clause. Cf. *Hoag* v. *New Jersey,* 356 U. S. 464; *Gore* v. *United States, supra.*

B. *In this case, each indictment had as an essential substantive element a factor not present in the other, reflecting in each instance a peculiar and separate interest of the prosecuting sovereign.*

The Illinois indictment charged a conspiracy to injure the property and communication facilities of two private corporations—the Southern Bell Telephone and Telegraph Company and the American Telephone and Telegraph Company. It is based on an Illinois statute, pp. 3–4, *supra,* which reaches common law conspiracies or agreements to violate Illinois statutes. *People* v. *Dorman,* 347 Ill. App. 317, 106 N. E. 2d 842; *Maloney* v. *People,* 132 Ill. App. 184; 2 Moore, Ill. Crim. L. and Proc. (1932 Ed.), Sec. 971. Under Illinois law, where the crime charged is against private interests, the particular private interest affected must be alleged and proved. *People* v. *Livermore,* 390 Ill. 85, 95, 60 N. E. 2d 413, 417; and see *People* v. *Flaherty,* 396 Ill. 304, 310, 71 N. E. 2d 779, certiorari denied, 331 U. S. 856; *People* v. *Walker,*

7 Ill. 2d 158, 161, 130 N. E. 2d 182.[7] It is clear, therefore, that the social interest which Illinois sought to protect by its prosecution was in the sanctity of privately-owned property from conspiracies to cause its malicious destruction. The vindication of private property rights is a matter of peculiarly local interest, and, of course, under their police power the states may punish depredations to private property within their separate and exclusive sphere of operation and without interference from the federal government. Cf. *Kelly* v. *Washington,* 302 U. S. 1, 10; *California* v. *Zook,* 336 U. S. 725, 738; *Union Brokerage Co.* v. *Jensen,* 322 U. S. 202, 208–209; *Reid* v. *Colorado,* 187 U. S. 137, 150. The general nature of the state interest in protecting its citizens against unlawful conspiracies is indicated by the broad scope of the Illinois conspiracy statute, *supra,* pp. 3–4. The statute covers a multitude of subject matters, and, also in effect, codifies the common-law crime of conspiracy.

The federal indictment, on the other hand, alleges a conspiracy to commit an offense "against the United States." It charges a violation of 18 U. S. C. 1362, *supra,* p. 3, which punishes willful or malicious injury to "means of communication, operated or controlled by the United States," and malicious interference with the working or use of any such line. Thus, unlike *Bartkus* v. *Illinois,* No. 1, where both the federal and state prosecutions were instituted under

[7] Illinois has a separate statute, patterned on the federal conspiracy statute, punishing conspiracies to commit any "offense against," or "to defraud" the state, "in any manner, or for any purpose." Title 38, Section 140, Smith-Hurd Ill. Stat. Ann.

"robbery statutes,"[8] here the state proceeding was brought under the general power of the state to punish unlawful conspiracies while the federal government prosecuted for a conspiracy to violate a specific and narrow federal statute.

To establish the federal offense, it was essential to prove knowledge by the conspirators that the means of communication were operated and controlled by the United States. This was, in fact, a hotly contested issue at the trial and on appeal. Proof that the conspiracy was directed only to injury of property of the companies named in the Illinois indictment would not have established the federal offense or supported the allegations of the federal indictment.

The substantial nature of the federal interest protected is made clear by the history of 18 U. S. C. 1362. This provision derives from the Act of June 23, 1874, 18 Stat. 250, which punished the willful or malicious injury of telegraphic lines constructed, owned, occupied, or controlled by the United States. The Act which emanated from the House Committee on Military Affairs, together with other legislation dealing with problems arising out of the Civil War (2 Cong. Rec. (pt. 4) 3203; 2 Cong. Rec. (pt. 5) 4207), was designed as an anti-sabotage law to protect communication facilities used by the federal government which had not been adequately protected during the war crisis. The Act of 1874 was replaced by the Act of March 4, 1909 (35 Stat. 1099, 18 U. S. C. (1940 ed.) 116). The latter Act applied to the injury or

[8] We discuss *infra*, at pp. 32–33, other respects in which this case differs from *Bartkus* v. *Illinois*.

destruction of "any telegraph, telephone, or cable line, or system, operated or controlled by the United States", and thus reached new forms of government communication systems. S. Rep. 10, pt. 1, 60th Cong., 1st Sess., p. 16. During the Senate debate on this provision, its sponsor explained that it would be applicable only to federally operated or controlled communication systems.[9]

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[9] The following portion of the debate on the bill which was ultimately passed as the 1909 Act underscores this point (42 Cong. Rec. 857):

Mr. SUTHERLAND: Recurring for a moment to section 62, which has been passed over, and replying to the question asked by the Senator from New Jersey [Mr. Kean], the old law provided that "any person or persons who shall willfully or maliciously injure or destroy any of the works or property or material of any telegraphic line," and so on. The Senator from Idaho explained that the section had been broadened to include new appliances. The Senator from New Jersey desired to know whether it was broad enough to apply to wireless telegraphy. I answer him yes. The committee thinks the word "system" inserted in the new section covers wireless telegraphy.

Mr. HEYBURN: It says "cable line or system."

Mr. SUTHERLAND: Yes; so as to include cable and telephone and wireless systems. The word "line" in the original law would not include such apparatus.

Mr. KEAN: Yes; but wireless telegraphy does not use a cable.

Mr. HEYBURN: It is a system.

Mr. SUTHERLAND: It is a system.

Mr. HEYBURN: The word "system" is used to cover it.

Mr. SUTHERLAND: It is not a telegraphic line; it is a telegraphic system.

Mr. CULBERSON: Mr. President——

The VICE-PRESIDENT: Does the Senator from Utah yield to the Senator from Texas?

Mr. SUTHERLAND: Yes.

[cont.]

18 U. S. C. 1362 is a revision of the 1909 Act and broadens its provisions to include all "systems" of communication "operated or controlled by the United States." The section reaches only those offenses against property in which the federal government has a possessory or proprietary interest, and does not apply to offenses involving the destruction or injury of facilities owned, operated or controlled by private individuals which are left to the protection of the state. The "unit of prosecution" (*Bell* v. *United States*, 349 U. S. 81, 83) under 18 U. S. C. 1362 is a federally controlled or operated communication facility—the unit of the state offense is private property. The federal government could not, and did not, purport to prosecute the offense set forth in the state indictment and the state could not, and did not, purport to prosecute the offense set forth in the federal indictment.

Mr. CULBERSON: I was not in the Chamber when the Senator from New Jersey made his statement in reference to section 62, and I may be asking a question which he has already answered; but I should like for the Senator from Utah to explain why it is that the words "or system" have been inserted at these three several places in this section.

Mr. SUTHERLAND: For precisely the same purpose—because the original law covered only a telegraph line, and not a telegraph system. Since this law was originally adopted we have had the invention of wireless telegraphy, which is not a line, but a telegraph system; and it is quite as necessary, the committee think, to protect the apparatus of a wireless telegraph system as it is to protect the apparatus and works of a telegraphic line.

Mr. BACON: The section applies only to lines or systems owned or controlled by the United States.

Mr. SUTHERLAND: Yes.

Mr. BACON: It has no reference to other lines.

Mr. SUTHERLAND: It has reference to no others. It says "operated or controlled by the United States."

The state and federal crimes underlying the conspiracies charged relate to different subject matters lying within the particular province of each enforcement authority. The offenses are therefore distinct and are not "the same offence" within the meaning of the Fifth Amendment prohibition against double jeopardy. Cf. *Pettibone* v. *United States, supra* (148 U. S. at pp. 209–210).

The particular facts of this case emphasize the undesirable results that would flow from permitting a state prosecution to preclude federal enforcement of federal law protecting a federal interest. Here, the state returned an indictment, to which petitioners pleaded guilty, charging conspiracy to injure private property. The conspiracy related to property of private companies which was physically situated, not in Illinois, but in Mississippi. It was in Mississippi that the damage to the federally-controlled lines occurred.[10] However adequate Illinois may have regarded the three-month sentence imposed upon petitioners for the conspiracy to injure private property, it is not the measure of the right of the federal government to punish conspiracy to injure federally controlled property in Mississippi, or of the interest of the federal government in protecting its facilities and systems. If the rule were otherwise, so that a state conviction would preclude federal prosecution even though the state was less concerned with the par-

[10] Illinois law punishes "the act of conspiring to do certain wrongful acts, without regard to where such wrongful acts are to be done." *People* v. *Buckminster*, 282 Ill. 177, 181, 118 N. E. 497, 499.

ticular violation of its laws, or had interests different from those of the federal government, the fear expressed in *United States* v. *Lanza* (260 U. S. at p. 385) of the "race of offenders" to state courts might well be realized.[11]

The states do not normally enforce national policies through their own legislation. And the enforcement of federal laws, particularly those which relate to national defense and security, as here, should not be made to depend on the vagaries of state law which differ in respect to the "criteria of substantive offenses" and the procedures for their enforcement. Cf. *Pennsylvania* v. *Nelson, supra,* 350 U. S. at p. 509. This case is one where the state and federal laws are directed against diverse consequences or separate injuries arising out of a common series of acts or a common transaction. The basis of the state offense was a conspiracy in the State of Illinois to injure private property—the basis of the federal offense, a conspiracy entered into in the State of Mississippi to destroy and interfere with the use of property controlled and operated by the federal government. Even if it be assumed that each conspiracy contemplated a

[11] "If a State were to punish the manufacture, transportation and sale of intoxicating liquor by small or nominal fines, the race of offenders to the courts of that State to plead guilty and secure immunity from federal prosecution for such acts would not make for respect for the federal statute or for its deterrent effect. But it is not for us to discuss the wisdom of legislation, it is enough for us to hold that, in the absence of special provision by Congress, conviction and punishment in a state court under a state law for making, transporting and selling intoxicating liquors is not a bar to a prosecution in a court of the United States under the federal law for the same acts" (260 U. S. at p. 385).

common act or series of acts to effectuate its plan, the federal government could act independently to enforce federal law protecting federally controlled property.

II

IN ANY EVENT, A PRIOR STATE PROSECUTION CANNOT PRECLUDE FEDERAL ENFORCEMENT OF FEDERAL LAW

A. *The question of what effect a prior state conviction has on the right of the federal government to prosecute is reached in this case only if the crimes and the interests protected by both sovereigns are found to be identical.*

Petitioner here, like the petitioner in *Bartkus* v. *Illinois,* 355 U. S. 281, presently before this Court on reargument (No. 1), seeks to have this Court reconsider its holding in *United States* v. *Lanza,* 260 U. S. 377. For the reasons discussed in Point I of this brief, we think these arguments are largely inapposite to this case. As we have shown, they are based on the erroneous premise that the state and federal prosecutions here were, as in *Lanza,* for crimes defined in the same manner by both sovereignties, in furtherance of the same social policy. The common-law precedents cited by Professor Grant, upon which petitioner relies, relate to the same offense, usually murder, as to which one sovereign had extra-territorial jurisdiction; they do not cover different offenses arising out of the same act. See J. A. C. Grant, *The Lanza Rule of Successive Prosecutions,* 32 Col. L. Rev. 1309–1331; J. A. C. Grant, *Successive Prosecutions by State and Nation: Common Law and British Empire Comparisons,* 4 U. C. L. A. L. Rev.

1–37. Professor Grant himself has noted that where "crimes are sufficiently distinct to warrant successive prosecutions by the same government, there can be no objection to the nation's punishing one after the state has punished the other. See 32 Col. L. Rev. at p. 1310, n. 8.

For the same reasons, this case is distinguishable from the *Bartkus* case. There, the Court has before it a state conviction for robbery *after* an acquittal in a federal court of robbery of the same bank, federal insurance of the bank's funds being the basis of federal jurisidction. The petitioner's argument there is based on the premise that the interests protected by the state and federal laws are the same, and that, aside from the allegation of federal jurisdiction, the crime is defined in the same manner. Petitioner in *Bartkus* recognizes (Br. in No. 39, Oct. T., 1957, p. 15) that "if the offenses have different policies, the state trial (*e. g.*, for murder) would not bar a federal trial (*e. g.*, for deprivation of civil rights)." Petitioner in *Bartkus* also agrees that "By selling liquor to a minor on Sunday it may be that by one act a man may commit two offenses for purposes of double jeopardy" (*Ibid.*, p. 33). See the dissenting opinion of the Chief Justice in *Gore* v. *United States, supra.* We have shown in Point I that, by destroying private property and interfering in the use and working of a federal communications system, a man may similarly commit two offenses.[12] Certainly his conduct is such that each

[12] With respect to the problem of two conspiracies, each made criminal by specific statutes and having separate unlawful objectives, see *American Tobacco Co.* v. *United States*, 328 U. S. 781, 788.

sovereign whose separate interest has been violated may act to enforce its laws.

Other factors also distinguish this case from *Bartkus*. We do not attach critical significance to the fact that there the second prosecution followed an acquittal, whereas here the later prosecution followed a conviction, so that there could be no claim here that, despite the difference in parties, principles of *res judicata* and collateral estoppel are involved.[13] What is significant is that petitioner in *Bartkus* argues that federal supremacy barred state prosecution after a federal acquittal. Here, federal supremacy would preclude the state conviction from being a bar to federal enforcement of federal law. For that reason, we agree that questions of federal supremacy are relevant

[13] Unlike *Bartkus* (Br. in No. 39, Oct. T., 1957, pp. 61–63), petitioner herein does not rely upon the Seventh Amendment to the Constitution which provides that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." Since there was here no prior jury trial, the Seventh Amendment has no applicability. Moreover, this Amendment was clearly designed to cover civil trials (compare its language with that of the Sixth Amendment) between the same parties. One cannot assume that the same rule must have been intended in criminal trials where the parties to the litigation (the prosecuting sovereigns) are different. The concept of *res judicata* is embodied in the Seventh Amendment. But when the parties are different, relitigation of the same issue, even in civil litigation, would be in accordance with the rules of the common law. Therefore, even if the Seventh Amendment were applicable to criminal trials, the accused would have to establish an identity of parties and of the issues being examined before *res judicata* could be invoked to preclude a second trial. But if this could be shown, the Fifth Amendment would itself bar the second trial. In short, the Seventh Amendment does not alter the basic issues now before the Court.

in this area of the law but, as we show below, they here operate to sustain the federal conviction.

As we have stated, neither the basic issue of double jeopardy posed by *Lanza*, nor the issues of federal supremacy, need be reached in this case if we are correct in our contention (argued in Point I, *supra*) that the crimes defined by the state and federal governments in the statutes here involved are different. To reach those issues in this case one must hypothesize (1) a valid federal law protecting the identical interests as those sought to be protected by the state and (2) that, despite this identity of interests, federal law has not preempted the field. Because the federal law here in question is an anti-sabotage statute designed to protect federal communications systems against malicious destruction and/or interference and delay or obstruction of message transmission, it may well be that, if the state sought to protect the identical interest, problems of double jeopardy would be obviated by a finding that the federal act had occupied the field. *Pennsylvania* v. *Nelson,* 350 U. S. 497. But assuming that this has not occurred here, we submit that it follows as a postulate of a federal system, that, if the federal law sets forth a policy which properly lies within the sphere of federal interests, enforcement of that policy may not be frustrated because the state (or the defendants) have won the "race" to obtain the first judgment in a state court. We submit that a state, by obtaining the first judgment, cannot prevent the federal government from enforcing, as the federal government sees fit, a valid federal policy (unless, as it has sometimes done [see *infra,* p. 36],

Congress should so provide). To that ultimate proposition we now turn.

B. *The federal government should properly be free to enforce federal law regardless of state action.*

United States v. *Lanza,* 260 U. S. 377, has been the law since December 1922. It was decided by a unanimous Court, in an opinion by the then Chief Justice which rested on earlier statements and rulings. Although it has been criticized in academic and some judicial circles, *Lanza* has not been overruled or modified by this Court. See *Jerome* v. *United States,* 318 U. S. 101, 105; *Screws* v. *United States,* 325 U. S. 91, 108, fn. 10. Its holding is that, regardless of the nature of the differences, if any, between the state and federal interests sought to be protected, no state prosecution can preclude the federal government from enforcing federal law. The Fifth Amendment, the Court noted, applied only to proceedings by the federal government (citing *Barron* v. *Baltimore,* 7 Pet. 243)[13a] and "the double jeopardy therein forbidden is a second prosecution under authority of the Federal Government after a first trial for the same offense under the same authority". 260 U. S. at 382.

The proposition that the state and federal government may each define its own policies in relation to its self-protection was considered an essential attribute of federal government and the constitutional principle of distribution of powers. The successive prosecutions of state and federal prohibition offenses

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[13a] See *Palko* v. *Connecticut,* 302 U. S. 319; *Adamson* v. *California,* 332 U. S. 46; *Knapp* v. *Schweitzer,* No. 189, Oct. Term, 1957, decided June 30, 1958.

involved in *Lanza,* and in *Hebert* v. *Louisiana,* 272 U. S. 312, were justified on the basis that "[e]ach government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other." (260 U. S. at p. 382.) In respect to the prohibition laws, both the federal government and the states had policies of law enforcement which paralleled each other, yet the offense described by each was an expression of the policy of each in respect to its own constitutional authority which each government enforced for itself. The Court wrote (260 U. S. at p. 382):

> We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject-matter within the same territory. Each may, without interference by the other, enact laws to secure prohibition, with the limitation that no legislation can give validity to acts prohibited by the Amendment. Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other.
>
> It follows that an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each.

The Court pointed out that Congress could, if it saw fit, bar prosecution by the federal courts for any act which had been punished by the state.[14] It noted, 260 U. S. at p. 385:

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[14] Where Congress has intended that a prior state conviction or acquittal should preclude federal prosecution "for the same act or acts", it has so provided. See 18 U. S. C. 659 (em-

> If a State were to punish the manufacture, transportation and sale of intoxicating liquor by small or nominal fines, the race of offenders to the courts of that State to plead guilty and secure immunity from federal prosecution for such acts would not make for respect for the federal statute or for its deterrent effect. * * *

In our federal system of government, the state and federal government may each separately determine its own policies of law enforcement. As the opinion of this Court in *Feldman* v. *United States*, 322 U. S. 487, 490–491, states:

> The distinctive operations of the two governments within their respective spheres is basic to our federal constitutional system, howsoever complicated and difficult the practical accommo-

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[fn. 14 continued]
bezzlement or theft of baggage in interstate of foreign commerce), 18 U. S. C. 660 (embezzlement of funds of interstate carriers), 18 U. S. C. 1992 (wrecking of trains), and 18 U. S. C. 2117 (breaking into an interstate carrier with intent to steal therein). See Note, 55 Columbia L. R. 83, 93, fn. 60.

The contention advanced by petitioner (Br. 21) that this Court should, in the exercise of its supervisory powers, bar a federal trial after a state proceeding is without merit. As the Court states in *Lanza*, this is a matter for Congress not the judiciary and, as we note *supra*, Congress has on occasion specifically legislated on this question. The situation here is entirely unlike that in *Rea* v. *United States*, 350 U. S. 214, where "[a] federal agent ha[d] violated the federal Rules governing searches and seizures—Rules prescribed by this Court and made effective after submission to the Congress. See 327 U. S. 821 *et seq.* The power of the federal courts extends to policing those requirements and making certain that they are observed." 350 U. S. at p. 217. If, as we submit, the action of the federal officials in trying petitioner for the federal offense violated no constitutional mandate, there would be no rule or reason which would provide a basis for upsetting this conviction.

> dations to it may be. The matter was put in classic terms in what Chief Justice Taft called "the great judgment," *Ponzi* v. *Fessenden,* 258 U. S. 254, 261, of Chief Justice Taney in *Ableman* v. *Booth,* 21 How. 506, 516: "the powers of the General Government, and of the State, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. And the sphere of action appropriated to the United States is as far beyond the reach of the judicial process issued by a State judge of a State court, as if the line of division was traced by landmarks and monuments visible to the eye."

And see *Jack* v. *Kansas,* 199 U. S. 372, 379–380; *Logan* v. *United States,* 144 U. S. 263; *Knapp* v. *Schweitzer,* No. 189, Oct. Term, 1957, decided June 30, 1958.[15]

Even where the social interest protected by the federal and state governments is the same, the offenses as defined by the different legislatures may be and frequently are different. As Judge Ervin observed in *United States* v. *Bostow,* 273 Fed. 535, 538 (S. D. Ala.):

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[15] In the *Knapp* case, its latest pronouncement with respect to the impact of federalism on criminal prosecutions, the Court said:

"This Court with all its shifting membership has repeatedly found occasion to say that whatever inconveniences and embarrassments may be involved, they are the price we pay for our federalism, for having our people amenable to—as well as served and protected by—two governments. * * *"

What meaning shall be given the words "the same offense"? How shall they be construed? If the Congress can pass legislation to enforce the Prohibition Amendment, and the states may also do so, it is manifest that such legislative acts will differ—that different laws will be provided for the enforcement of the amendment, and different punishments will be imposed. It is also manifest that often the same act or transaction will violate both the federal and state provisions, so the question arises: Where the same act violates both statutes, has there been only one or more offenses committed? It will be conceded that the offender cannot be tried in the federal court for violation of the state statute, nor in the state court for the violation of the federal statute; so it appears that the offense is not the act or transaction alone, but that the act or transaction must be considered in the light of the legislative provisions and prohibitions.

In the absence of such legislative prohibitions, the act or transaction committed would not be an offense. It is not the prohibited act, but the terms of the statute, which declares and defines the offense. It seems to me, therefore, that as each legislative entity, whether state or federal, declares its own offense, this cannot be the same offense as that provided by the other, though the same act or transaction may violate each of them, but that there are as many offenses as the legislative provisions may declare.

To the extent that the interests are separately defined and separately punished, it cannot be said that the

policies of one sovereign are effectively enforced by the other.

In this connection, in the banking field where, as the petitioner in *Bartkus* contends, federal and state interests are closely allied, if not identical, two decisions of this Court are worth noting. In *Cross* v. *North Carolina,* 132 U. S. 131, this Court held that the fact that Congress made the crime of making false entries concerning a promissory note on the books of a national bank with intent to deceive a government examiner an offense against the United States, did not preempt the power of the state to prosecute the crime of forging the same note payable to the national bank, regardless of the fact that each offense might arise out of the same transaction. In meeting the contention of the plaintiffs in error that the forgery charged was (132 U. S. at p. 137) "an integral, essential element in such entries [proscribed by R. S. 5418], which were false only because based upon the forged notes," the Court said (*ibid.* pp. 139–140):

> The argument in behalf of the plaintiffs in error fails to give effect to the established doctrine that the same act or series of acts may constitute an offence equally against the United States and the State, subjecting the guilty party to punishment under the laws of each government. * * * If it were competent for Congress to give exclusive jurisdiction to the courts of the United States of the crime of falsely making or forging promissory notes, purporting to be executed by individuals, and made payable to or at a national bank, or of the crime of uttering or publishing as true any

such falsely made or forged notes, it has not done so. Its legislation does not assume to restrict the authority, which the States have always exercised, of punishing in their own tribunals the crime of forging promissory notes and other commercial securities executed by private persons, and used for purposes of private business. The forgery of such instruments is none the less injurious to the welfare of the people of a State because they happen to be made payable to or at banking associations which come into existence under the authority of the United States. If the punishment by the State of the crime of forgery, of which the defendants were found guilty, leaves them exposed to punishment by the United States for having made false entries upon the books of the bank of which they were officers, with the intent to deceive the agent appointed by the general government to examine its affairs, it results from the fact that they are amenable to the laws of the United States, as well as of the State of North Carolina, and may be subjected to punishment for violating the laws of each government. The forgery may have been committed in order that the instrument forged might thereafter become the basis of false entries upon the books of the bank. But that circumstance cannot defeat the authority of the State, charged with the duty of protecting its own citizens, from punishing the forgery as, in itself, a distinct, separate offence committed within its limits and against its laws.

See also *Westfall* v. *United States*, 274 U. S. 256, 258, where the Court, through Justice Holmes, said:

> * * * The argument is that Congress has no power to punish offences against the property

rights of State banks. It is said that the statute is so broad that it covers such offences when they could not result in any loss to the Federal Reserve Banks, and it is suggested that if upheld the Act will invalidate similar statutes of the States. This argument is well answered by *Hiatt* v. *United States,* 4 F. (2d) 374, 377. Certiorari denied. 268 U. S. 704. Of course an act may be criminal under the laws of both jurisdictions. *United States* v. *Lanza,* 260 U. S. 377, 382. And if a state bank chooses to come into the System created by the United States, the United States may punish acts injurious to the System, although done to a corporation that the State also is entitled to protect. The general proposition is too plain to need more than statement. That there is such a System and that the Reserve Banks are interested in the solvency and financial condition of the members also is too obvious to require a repetition of the careful analysis presented by the Solicitor General. The only suggestion that may deserve a word is that the statute applies indifferently whether there is a loss to the Reserve Banks or not. But every fraud like the one before us weakens the member bank and therefore weakens the System. * * *

It has been suggested (brief for petitioner in *Bartkus,* No. 39, Oct. T., 1957, p. 15) that there need be no great concern over the race to the state courts because "if the first trial is a mock trial, it is not jeopardy at all under established principles." Cited for this proposition, the abstract validity of which we do not dispute, are various dicta and treatises.

Professor Grant similarly states that "Of course a collusive or fraudulent proceeding, even though in the courts of the same government, has never been accepted as a bar to a subsequent prosecution." 4 U. C. L. A. L. Rev. 1, 3, fn. 6. But as a practical matter this exception to the principles of double jeopardy, were that doctrine otherwise applicable, would supply little real assurance that federal policies could not intentionally be thwarted by invocation of state proceedings. The problems of proving a suit to be collusive are very great, and would in most instances be insurmountable. In the cases cited by Professor Grant, *e. g., Commonwealth* v. *Alderman,* 4 Mass. 477 (1808); *State* v. *Cole,* 48 Mo. 70 (1871), proof that the prior proceeding was a sham was easily adduced since in those cases the defendant, after assaulting the victim, informed against himself before a justice of the peace and paid a nominal fine. The courts had no difficulty in holding that this self-invoked proceeding before the justice of the peace did not preclude a later prosecution initiated by the state or the victim. But in most "collusive suits" one may expect the participants to show greater sophistication. If the prosecution is in form initiated by the state's prosecutor, it would generally be impossible to establish the collusiveness of the state suit.[16] Surely, the

[16] See *State* v. *Little,* 1 N. H. 257, 259, where, in holding that a proceeding before a Justice of the Peace initiated by an agent of the defendant did not preclude a subsequent prosecution, the court wrote:

> But when prosecutions before the higher courts, are managed by the attorney general, the solicitor or counsel appointed by the judges: and before single magistrates,

federal court should not be called upon to inquire whether the sentence, if any, imposed by the state court was adequate to indicate that the suit was bona fide. Even a serious offender in a genuinely adversary proceeding may be given a suspended sentence if the judge believes he will reform. Nor would inquiry into the extent of cooperation between the defendant and the state's prosecuting officers enhance harmonious federal-state relations. However valid in theory the concept that a mock trial does not constitute jeopardy may be, we submit that it does not provide an answer in those areas where, unfortunately, conflicts may exist between state and federal policy, or where particular federal laws may be locally unpopular (as was Prohibition). See *United States* v. *Barnhart*, 22 Fed. 285, 292 (D. Ore. 1884):

> And again, it must be born in mind that the policy of the state and the United States may be, and sometimes is, at variance on a given subject. In such case, the former may indirectly hinder or defeat the policy of the latter, if a trial in its courts for a crime growing out of an act which also constitutes a crime against the United States can be used as a bar to a prosecution of the offender in the national courts. For instance, the United States, under the fifteenth amendment, may punish any one who discriminates against the exercise of the elective franchise by another on account of color. *U. S.* v. *Reese*, 92 U. S. 217. But if

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by similar counsel, or by the party aggrieved, or by disinterested individuals, such prosecutions can never perhaps be considered fraudulent * * * An offender however, can possess no implied authority to conduct a prosecution against himself * * *.

> the state may also declare such an act a crime, it may purposely affix a mere nominal punishment thereto, and thus give any one guilty of such an act an opportunity to seek refuge in its tribunals before the United States can reach him, and by a trial and acquittal therein, at the hands of a sympathizing jury, or the imposition of a mere nominal punishment, effectually prevent the United States from prosecuting the offender in its own courts, and inflicting such punishment upon him as may be necessary to vindicate its authority and maintain its policy in the premises.

Federal laws passed by Congress to enforce federal policy are properly enforced by federal courts, regardless of state law and state enforcement policy. If Congress wishes to defer to state enforcement it can, and, as noted *supra,* p. 36, sometimes has done so. But that is for Congress to decide. Under our system of government, a state should not be able to preclude the federal government from enforcing federal law.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgments appealed from should be affirmed.

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